SPRAWY MIĘDZYNARODOWE

2020, t. 73, nr 4
ISSN 0038-853X
DOI 10.35757/SM.2020.73.4.08

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The most favoured nation clause in tax matters from the perspective of the EU and the GATT

Klauzula największego uprzywilejowania w sprawach podatkowych z perspektywy UE i GATT

Keywords:
most favoured nation clause, double tax avoidance conventions, OECD, GATT

Słowa kluczowe:
klauzula największego uprzywilejowania, umowy o unikaniu podwójnego opodatkowania, OECD, GATT

The most favoured nation clause in tax matters from the perspective of the EU and the GATT

The most favoured nation clause has been one of the most complex elements of tax law. This results from the fact that it concerns the sensitive matter of the sovereignty of states related to fiscal matters and originates from various legal acts that have been established at international, European Union (EU) and national law levels. Additionally, it is related to the EU's dual membership of the World Trade Organization (WTO). The added value of the article is the endeavour to define the mutual relationship between the most favoured nation clause expressed in Art. 1 (1) of the GATT, resulting from EU law and Art. 24 of the OECD MC that is the template for bilateral agreements of double tax avoidance. The aim of the research is a comparison of the above-mentioned regulations in order to establish what kind of relationship exists between those regulations. In conclusion, it should be considered that in the current legal state, Art. 1 (1) of the GATT does not constitute the basis for the interpretation of bilateral double taxation avoidance agreements, unless their provisions are consistent with each other. The following research methods have been applied in the article: legal comparison, descriptive and analytical.

Klauzula największego uprzywilejowania w sprawach podatkowych z perspektywy UE i GATT

Klauzula największego uprzywilejowania (KNU) stanowi jedno z najbardziej złożonych zagadnień prawa podatkowego. Wynika to z faktu, że dotyczy ona delikatnej materii, jaką jest suwerenność państw w sprawach fiskalnych, oraz wywodzi się z różnych aktów prawnych, uchwalanych na poziomie prawa międzynarodowego, prawa UE i prawa krajowego. Dodatkowo wiąże się z członkostwem UE w WTO. Wartością dodaną artykułu jest próba określenia wzajemnych relacji pomiędzy instytucją KNU wyrażoną w art. 1 (1) GATT wynikającą z prawa UE oraz art. 24 MK OECD, który stanowi wzorzec dla dwustronnych umów o unikaniu podwójnego opodatkowania. Celem badań jest porównanie wymienionych regulacji i próba odpowiedzi na pytanie, jaka zachodzi między nimi relacja. Jako konkluzję należy przyjąć, że w obecnym stanie prawnym art. 1 (1) GATT nie stanowi podstawy interpretacji dwustronnych umów o unikaniu podwójnego opodatkowania, chyba że ich postanowienia są ze sobą spójne. W niniejszym artykule zastosowano następujące metody badawcze: prawnoporównawczą, opisową i analityczną.

Introduction

After World War II, the non-discrimination principle began to play a key role in building cooperation among states in terms of international trade law and tax law. A multilateral plain became its dominating form in both global and regional perspectives.

In 1947, the General Agreement on Tariffs and Trade was signed. Originally, it was proposed it became part of the Havana Charter for an International Trade Organization. As this never came into force, the GATT 1947 remained provisionally in force until its stipulations became part of the GATT 1994 (the GATT), itself a component of the World Trade Organization (WTO) Agreement (the Marrakesh Agreement). The Marrakesh Agreement, which established the World Trade Organization, entered into force on 1 January 1995.

This organisation is mainly based on three pillars: trade liberalisation of goods, services and intellectual property. Thus, the most crucial regulations include the GATT, the General Agreement on Tariffs in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Taking into consideration some geopolitical and economic relations within Europe, based on the multilateral agreements of the European Economic Community (EEC Treaty), the Treaty establishing the European Coal and Steel Community (ECSC Treaty) and the European Atomic Energy Community (Euratom), a process of regional integration was initiated, with the Treaty on the Functioning of the European Union (TFEU) as its main current legal basis. Simultaneously with entering into multilateral covenants, including free trade agreements – not the subject of this article – it became more and more common practice for states to regulate the principles of international trade and tax cooperation on the basis of bilateral agreements, under the Model Tax Convention on Income and on Capital (the OECD MTC)[1] of contractual double tax avoidance conventions (DTCs). Research, interpretation and exceptions to the non-discrimination provisions in international trade and taxation are closely related to the issue of integration or cooperation.[2]

1 This model is commonly valid in European Union countries.

2 A. M. Odio, *The most favoured nation and non-discrimination provisions in international trade law and the OECD codes of liberalisation*, „OECD Working Papers on International Investment" 2020, No. 1, DOI: <https://doi.org/10.1787/c7abd09b-en> [accessed: 15 I 2021].

This article does not discuss which of these approaches is best from the point of view of the non-discrimination principle. It only shows that its legal character depends on the type of cooperation.

The non-discrimination principle protects values conceded by states and allows them to develop economically in a better way. From the legal point of view, a non-discrimination principle usually consists of two tiers: the most favoured nation clause (MFN clause)[3] and the national treatment principle (NT principle). Herein, only the MFN clause, as the most complicated issue, will be researched.

The author's opinion is that there is no other subject of tax law that is so complex and controversial. This results from such points as the legal relation between the European Union (EU) and the WTO, a legal concept of the MFN clause and its application to direct taxes. The article is divided into six parts. The first part is the introduction. The second applies to the EU's membership of the WTO. The third focuses on the MFN clause and the issue of taxes in the GATT. The fourth concerns the notion of the MFN clause in the EU legal order. The fifth one applies to the concept of the MFN clause in double taxation avoidance conventions (DTCs) and the sixth part of the article lays out the conclusions. The hypothesis of this article is that the MFN clauses included in the GATT and in DTCs are of similar character.

The research has been carried out with the intention to verify and answer the following question: Is it possible to invoke international trade regulations to interpret contractual regulations on the avoidance of double taxation?

The following research methods have been used: legal comparison, analytical and descriptive.

EU membership of the WTO

From its inception, the European Community (EC) has been creating external relationships. With its international legal status, it initiated diplomatic relationships with other countries and international organisations,[4]

3 M. M. Kałduński, *Klauzula największego uprzywilejowania* ['The most favoured nation clause'], Dom Organizatora, Toruń 2006, p. 289–298.

4 J. B. Bazerkoska, *The European Union and the World Trade Organization: problems and challenges*, „Croatian Yearbook of European Law and Policy" 2011, vol. 7, issue 7, p. 279.

thus creating a network of bilateral and multilateral agreements.[5] Provisions on external trade relations were contained in Art. 110–116 of the EEC Treaty and included the lifting of customs duties, the abolition of quantitative restrictions and the establishment of a common customs tariff. The Community had planned the implementation of this plan by 31 December 1969. Earlier, on 1 July 1968, the phase of creating the customs union had been completed. This date indicates the influence of the GATT 47 policy on EC policy and is related to the Kennedy Round in the years 1964–1967, which was a breakthrough in the reduction of tariffs and the regulation of non-tariff trade restrictions.[6] After the end of the transition period, i.e. 1 January 1970, the provisions of the EC Treaty on the Common Commercial Policy (CCP) entered into force, including relations with third countries.

The establishment of the EC meant that a new, original and specific legal order was created, which helped to achieve the treaty's goal in the form of market integration. On the one hand, the states entrusted the EC with competences they had had previously,[7] on the other hand, they provided it with competences that they had not previously performed themselves.[8]

5 The main aim of the GATT 47 was to promote trade liberalisation using non-discrimination, transparency and reciprocity principles. These regulations are not absolutely binding. The GATT 47 included a lot of exceptions to these regulations, such as, for example, free trade areas and customs unions. From this point of view, some researchers emphasise that the GATT 47 contributed to the establishment of the EU. Similarly to the GATT and then to the WTO, the EU was established with the objective of removing tariff barriers and supporting trade between member states. The structure of the single market of the EU partly follows the principles adopted by the GATT.

6 M. Kaniel, *The exclusive treaty making power of the European Community up to the period of the Single European Act*, Kluwer Law International, The Hague–Boston 1996, p. 67–79.

7 C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki* ['European Community law. Problems of theory and practice'], t. 1, C. H. Beck, Warszawa 2000, p. 267; A. Dashwood, *The limits of European Community powers*, „European Law Review" 1996, vol. 21, No. 2, p. 115.

8 J. Kranz, *Suwerenność w dobie przemian* ['Sovereignty in the era of changes'], [in:] *Suwerenność i ponadnarodowość a integracja europejska* ['Sovereignty and supranationality and European integration'], red. J. Kranz, Prawo i Praktyka Gospodarcza, Warszawa 2006, p. 41–42; D. Sarooshi, *International organizations and their exercise of sovereign powers*, Oxford University Press, Oxford 2007, p. 3–123.

This issue had been causing many problems for a long time. The paradox was that the EC Treaty did not explicitly indicate the categories of matters falling within the competence of the Community.[9] Therefore, the explanation of what should have been understood by the exclusive, shared and coordinating categories was doctrinal in nature and referred to the case law of the European Court of Justice (ECJ), which developed in a non-uniform way.[10] The EEC Treaty assumed the exclusive competence within the CCP to regulate external trade relations. The Court only confirmed this in Opinion 1/75.[11] This approach was justified by ensuring the consistency and effectiveness of trade policy. First, it could not be allowed to compete with the policies pursued by individual states. Second, a variety of trade policies could distort trade and cause deeper disparities in the economic development of states,[12] and this would contradict the essence of the cohesion policy.

The key significance in the creation of the relations of the EC is that the GATT 47 is included in the case of AETR/ERTA.[13] In 1971, the ECJ examined the dispute between the Council and the Commission regarding the competences to conclude international agreements. At that time, the Court stated that such powers may result not only from explicit regulations of the treaty, but also should be derived from all its provisions on a given case and from measures adopted by Community institutions.[14]

9 S. Weatherill, *Competence creep and competence control*, „Yearbook of European Law" 2004, vol. 23, issue 1, p. 1.

10 P. Saganek, *Podział kompetencji między Wspólnoty Europejskie a państwa członkowskie* ['Division of powers between the European Communities and their member states'], Prawo i Praktyka Gospodarcza, Warszawa 2002, p. 1–311.

11 Opinion 1/75 of the Court of 11 XI 1975 given pursuant to Article 228 of the EEC Treaty (ECR 1975:1355).

12 P. Craig, G. de Búrca, *EU law. Text, cases and materials*, Oxford University Press, Oxford 2001, p. 378.

13 Judgment of the Court of 31 III 1971, Case 22–70: *Commission of the European Communities v Council of the European Communities* (ECR 1971:263).

14 Although, the ECJ in Cornelis Kramer and others case has ruled that the Community is competent to enter into international obligations in all areas of the tasks set out in part one of the Treaty. *Prawo Wspólnot Europejskich. Orzecznictwo* ['European Communities law. Jurisprudence'], wybór i red. W. Czapliński et al., Scholar, Warszawa 2001, p. 279.

The Court concluded „each time the Community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form these may take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules".[15] Thus, the doctrine of the Community's external implied powers to conclude international agreements began to take shape in the jurisprudence of the ECJ. The AETR/ERTA doctrine makes it possible to state the existence of EC competence to the extent that the EC exercised its internal competence and adopted binding legal acts (occupied field doctrine). This means that at the beginning of the validity of the treaty, communities could conclude agreements only within the scope indicated in the EEC Treaty, and as a result of the AETR/ERTA doctrine, this scope was extended.[16]

The next step to create external relations was the issue of Opinion 1/76[17] (doctrine 1/76). On the basis of the case of the European laying-up fund for inland waterways vessels, the ECJ significantly expanded the scope of the external competence of the EC, stating that the EC could have implied external competence even if the EC did not use its internal competences to create secondary law, and EC action was necessary to achieve a specific treaty objective, and that objective could not have been achieved by adopting internal measures.[18] Due to its wide scope, doctrine 1/76 was the subject of discussion

15 Judgment of the Court of 14 VII 1976, Joined cases 3, 4 and 6/76, References for a preliminary ruling: *Arrondissementsrechtbank Zwolle and Arrondissementsrechtbank Alkmaar – Netherlands. Biological resources of the sea* (ECR 1976:1279), para. 17–82.

16 According to Art. 210 of the EEC Treaty, the Community has a legal personality, *ius contrahendi, ius legationis* and the ability to incur international obligations, although, pursuant to Art. 228, the powers with regard to external relations, that the Community's has these only if the treaty provides them. A. Kalisz, *Wykładnia i stosowanie prawa wspólnotowego* ['Interpretation and application of Community law'], Wolters Kluwer, Warszawa 2007, p. 64.

17 Opinion 1/76 (1977) of the Court of 26 IV 1977 given pursuant to Article 228 (1) of the EEC Treaty: *Draft Agreement establishing a European laying-up fund for inland waterway vessels* (ECR 1977:741).

18 P. Eeckhout, *EU external relations law*, Oxford University Press, Oxford 2011 (Oxford EU Law Library), p. 70–77.

for many years. The situation changed once Art. 3 (2) TFEU came into force, stipulating the scope of the exclusive competence of the EU.[19]

In the Opinion 2/91, the Court stated that if the terms of the EU's participation in an international agreement were excluded and the scope of the agreement fell within an external competence, these competences might have been exercised through the member states acting in the interests of the EU.[20] The Court referred to this concept many years later in Opinion 1/03 and in Opinion 1/13.[21] The Court concluded that to be able to talk about the exclusive competence of the EU, it was not necessary for total compliance between the scope of the international agreement and the scope of Community regulations to exist. As it concerns international agreements, they are included in „an area which is already covered to a large extent by Community rules",[22] and analysis of the regulations should be based on the scope, the character and the contents of the regulations. This approach applies especially to harmonised areas, even when there is no contradiction between national regulations and proposed international rules.[23]

This means that if the area is largely covered by Community law, the internal competence of the member states to act does not exclude the external competence of the Community.

While in the AERT/ERTA doctrine the ECJ extended the scope of exclusive competence, in Opinions 2/92 and 1/94, the Court was more balanced and pointed to a different context. In Opinion 1/92, the ECJ stated that if the member states were allowed to enter into international commitments and thus influence the rules adopted in areas not covered by common policies or to change the scope of those policies, the Community's tasks and the objectives of the Treaty would be under threat, a very undesirable situation.

19 A. Rosas, *EU external relations: exclusive competence revisited*, „Fordham International Law Journal" 2015, vol. 38, issue 4, p. 1078.

20 Opinion 2/91 of the Court of 19 III 1993, Convention No. 170 of the International Labour Organization concerning safety in the use of chemicals at work (EU:C:1993:106), para. 10–11.

21 Opinion 1/13 of the Court (Grand Chamber) of 14 X 2014 (ECLI:EU:C:2-14:2303), para. 67.

22 Opinion 1/03 of the Court (Full Court) of 7 II 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (ECR 2006:1145).

23 P. Craig, G. de Búrca, *EU law…*, p. 379.

Considering the matter chronologically, when the Maastricht Treaty was adopted on 7 February 1992, the situation concerning competences[24] became even more complex. The Treaty entered into force on 1 November 1993, and its most important achievement was the establishment of the EU based on three pillars: EEC, ECSC and Euratom (first pillar); Common Foreign and Security Policy (second pillar); and police and judicial cooperation in criminal matters (third pillar). From now on, countries that acceded to the EU on the basis of Art. 49 TEU acceded to the EU as a whole, and not to individual communities, policies and cooperation. Therefore, a question arose as to whether the EU was legally entitled to represent states in external relations.

This issue became very relevant with the establishment of the WTO. Contrary to the International Monetary Fund and the World Bank, the International Trade Organization had never been established. Thus, the GATT 47 played the role of a quasi-international organisation, in which, pursuant to Art. XXXII (1) of the GATT 47, only governments could be members. Therefore, the Community had no legal basis to become a contracting party. With reference to the above, although the EC was not a formal member of the GATT 47, it represented its member states at its forum.[25] Such practice was commonly accepted by the member states[26] and other contracting parties. The ECJ analysed the regulations of the GATT 47 for the first time in the case of the International Fruit Company.[27] The issue concerned stating whether on the basis of Art. 177 EEC Treaty (now 267 TFEU) the GATT

24 J. Galster, C. Mik, *Podstawy europejskiego prawa wspólnotowego. Zarys wykładu* ['Fundamentals of European Community law. Outline of the lecture'], Comer, Toruń 1996, p. 177.

25 It is interesting, since its decision 1/76, the ECJ positively reviewed the membership of the EC in the international organisation.

26 B. Ziemblicki, *Przyczyny i skutki jednoczesnego członkostwa Wspólnot Europejskich i ich państw członkowskich w Światowej Organizacji Handlu* ['Causes and effects of the simultaneous membership of the EC and their member states in the WTO'], „Spotkania Europejskie" 2009, nr 2, p. 116: <http://www.ziemblicki.pl/Przyczyny_i_skutki_jednoczesnego_czlonkostwa_wspolnot_europejskich_i_panstw_w_swiatowej_organizacji_handlu.pdf> [accessed: 15 I 2021].

27 Judgment of the Court of 13 V 1971, Joined cases 41 to 44-70: *NV International Fruit Company and others v Commission of the European Communities* (ECR 1971:411); P. J. Kuijper, *Case 21-24/72, International Fruit Company v Produktschap voor Siergewassen, Court of Justice of the EC, [1972] ECR 1219*, [in:] *Judicial decisions on the law of international organizations*, ed. C. Ryngaert et al., Oxford University Press, Oxford 2016, p. 235–244.

could constitute the model to examine the validity of the Community act and whether the Community might introduce restrictions on imports even when Art. XI.1 of the GATT 47 prohibited that. The ECJ stated that the contents of the Art. 177 EEC Treaty (now 267 TFEU) did not curb its jurisdiction and concluded that, in so far as under the EEC Treaty, the Community had assumed the powers previously exercised by the member states in the area governed by GATT 47, provisions of that agreement had the effect of binding the Community. It also reached the conclusion that the agreement was not intended to confer rights on individuals, therefore it did not have a direct effect. The Tribunal repeated its opinion many years later with reference to the WTO Agreement.[28]

The weakness of this judgement was the lack of detailed argumentation of the Court. Since it referred to the principle of consistent interpretation, it should exactly justify this already then. This did not happen until many years later. As the hierarchy of sources of law implies the primacy of international agreements concluded by the EU (the GATT) over secondary law (Common Customs Tariffs), the latter should be interpreted in a manner consistent with international agreements.[29] This approach of the Court is understandable given the perspective of domestic law, which must conform to the norms of international law.

Although the ECJ has never explicitly stated that GATT standards may indirectly influence the interpretations of EU and national law, the principle

28 F. G. Jacobs, *Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice*, [in:] *Law and practice of EU external relations*, ed. A. Dashwood, M. Maresceau, Cambridge University Press, Cambridge 2008, p. 15; Judgment of the Court of 23 XI 1999, Case C-149/96: *Portuguese Republic v Council of the European Union* (ECR 1999:8395).

29 Judgment of the Court of 26 IV 1972, Case 92-71: *Interfood GmbH v Hauptzollamt Hamburg-Ericus* (ECR 1972:231). The principle of consistent interpretation has been used extensively in ECJ jurisprudence (for example Judgment of the Court (Fourth Chamber) of 10 XII 1985, Case 290/84: *Hauptzollamt Schweinfurt v Mainfrucht Obstverwertung GmbH* (ECR 1985:3909); Judgment of the Court (Third Chamber) of 12 VI 1986, Case 183/85: *Hauptzollamt Itzehoe v H. J. Repenning GmbH* (ECR 1986:1873); Judgment of the Court (Sixth Chamber) of 13 II 1992, Case C-105/90: *Goldstar Co. Ltd v Council of the European Communities* (ECR 1992:677)), but it was not until 1996 that the ECJ justified it in a judgement of the Court of 10 IX 1996. Judgment of the Court of 10 IX 1996, Case C-61/94: *Commission of the European Communities v Federal Republic of Germany* (ECR 1996:3989).

of consistent interpretation proves it. Upholding the position that the provisions of the GATT had a direct effect, the Court admitted the possibility of relying on these provisions in two cases. These are the specific exceptions set out in Fediol[30] and Nakajima.[31] The first indicates that it is possible for a business entity to rely before the Court on the provisions of GATT 47 against a third country, if the act of secondary legislation refers to it. The second is that a business entity may rely on GATT 47 standards to investigate the legality of an act of law, if it was issued in compliance with a specific obligation under the GATT. This means that in order to refer to the GATT, it must be examined whether the intention of the EU body adopting an EU act was to fulfil the GATT obligation. This intention should be apparent from the preamble, from the content of the act or from another document.[32]

The EU consists of countries that had concluded agreements before and after the Rome Treaty entered into force. When the EEC was founded, the GATT 47 was about ten years old. This means that for its contracting parties it was a contract with well-established rights and obligations that they wished to continue to respect. Since GATT 47 is referred to as the so-called anterior treaty, this relationship is defined by Art. 351 TFEU (ex Art. 307 TEC) and the subsequent ones. It states that the provisions of the treaty do not affect the rights and obligations arising from agreements concluded with third countries before the Rome Treaty entered into force. It is noteworthy that the Court in the International Fruit Company case was able to state directly that the GATT 47 bound the Community and to support its position on Art. 351, a very soft rule, and not focus on the transfer of competences, which was much more convenient.[33] Therefore, analysing the relations between the GATT 47 and the Community, it is consistency that is

30 Judgment of the Court of 22 VI 1989, Case 70/87: *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities* (ECR 1989:1781).

31 Judgment of the Court of 7 V 1991, Case C-69/89: *Nakajima All Precision Co. Ltd v Council of the European Communities* (ECR 1991:2069).

32 J. Barcz, *W sprawie bezpośredniego skutku przepisów Porozumienia TRIPS w świetle prawa wspólnotowego, cz. 1* ['On the direct effect of the provisions of the TRIPS Agreement under Community law, part 1'], „Europejski Przegląd Sądowy" 2006, nr 2, p. 29.

33 M. Mendez, *The legal effects of EU agreements*, Oxford University Press, Oxford 2013, p. 178–180.

sought after and axiology, i.e. the common aim of realising the trade policy, that is stressed.

Since the WTO was established, the EU has been a member. Because of the earlier practices, this membership, in fact, constitutes the continuation of the informal membership of the GATT 47. Therefore, according to Art. XI.1 of the Marrakesh Agreement, the contracting parties to the GATT 1947, including all of the EC member states and the European Communities, have become original members of the WTO. In practice, this means that on the basis of Art. IX.1 of Marrakesh Agreement, when the EC exercises its right to vote, it has a number of votes equal to the number of its member states which are WTO member states.[34]

This legal situation amplified the hidden conflict between the Commission and the member states over the legal nature of the power to conclude the WTO Agreement. The Commission was of the opinion that it had exclusive competence in concluding international agreements, while the member states argued that with regard to the GATS and TRIPS, they were shared.

This issue was raised by the ECJ in Opinion 1/94,[35] and is known in the body of the ruling as Open Skies.[36] To reconcile the competence conflict, the Court found a pragmatic solution. According to this, the Commission had the power to represent the Community and its member states in relation to the GATS and TRIPS. On the other hand, the Community had exclusive competence in the field of the trade in goods (on the basis of not only the GATT but all the multilateral agreements on the trade in goods

34 Currently the WTO has 164 state parties. For example, Poland has been a member of the GATT – the predecessor of the WTO – since 1967 and became a member of the EU in 2004. Thus, Polish membership in the WTO is dual, firstly by the affiliation to the GATT and secondly because of Poland having joined the EU. According to Art. XVI (4) of the Marrakesh Agreement, member states ensure conformity of their laws, regulations and administrative procedures with annexed agreements (the GATT, GATS and TRIPS are included in the Marrakesh Agreement in the form of annexes).

35 Opinion of the Court of 15 XI 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty (ECR 1994:384).

36 See the series of „Open Skies": Judgment of the Court of 5 XI 2002, Case C-467/98: *Commission of the European Communities v Kingdom of Denmark* (ECR 2002:9519).

in accordance with Annex 1A of the Marrakesh Agreement), and in the field of the GATS and TRIPS, it had shared competence.[37]

With the WTO coming into existence and communities becoming its members, the Treaty of Amsterdam[38] granted the Council powers to extend the operation of the CCP to negotiations and international agreements in the field of the trade in services and intellectual property protection. There was also a change in the numbering of articles. Henceforth, Art. 113 of the TEU has been replaced by Art. 133 TEU. The Treaty of Nice[39] clarified the content of Art. 133 TEU, which extended the scope of the CCP to the trade in services and commercial aspects of intellectual property. The role of unanimity in the procedure for concluding such agreements has also been limited. It allowed member states to maintain and conclude international agreements to the extent that they were compatible with Community law and other relevant international agreements. The treaty also introduced a category of mixed agreements on the trade in cultural and audiovisual services, education and social and health services, which meant that these aspects fell under shared competences and required the joint consent[40] of the Community and its member states.[41]

The clear division of competences between the EU and its member states is a change of the utmost significance introduced by the TFEU.[42] Earlier attempts to clarify this issue were based on the jurisprudence

37 A. Rosas, *EU external relations...*, p. 1080.

38 *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, „Official Journal of the European Communities", vol. 40, 10 XI 1997, C 340, p. 1–144.

39 *Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, „Official Journal of the European Communities", vol. 44, 10 III 2001, C 80, p. 1–87.

40 J. Sozański, *Umowy międzynarodowe Unii Europejskiej po Traktacie z Lizbony* ['International agreements of the European Union after the Lisbon Treaty'], Polskie Wydawnictwo Prawnicze „Iuris", Poznań 2011, p. 250.

41 However, the Treaty did not grant explicit exclusive competence to transport services, which was confirmed by ECJ in Opinion 1/08 arguing that in Art. 133 (6) they were not listed. Therefore, they are shared competences. Opinion 1/08 of the Court (Grand Chamber) of 30 XI 2009 pursuant to Article 300 (6) EC, General Agreement on Trade in Services (GATS) (ECR 2009:11129).

42 *Consolidated version of the Treaty on the functioning of the European Union*, „Official Journal of the European Union", vol. 59, 7 VI 2016, C 202/1.

of the court and were made in the literature on the subject. Since then, Art. 133 of the TEU has been transferred to 207, while in the trade in services, the commercial aspects of intellectual property as well as foreign direct investments were regulated, indicating the exclusive competence in the field of CCP. Although this change has an ordering value, it does not mean that the legal character of this regulation is free from doubt.[43] Considering the relation between EU legislation and the WTO, the hierarchy of the sources of law is a matter of difficulty.[44] EU law takes precedence over the internal law of a member state.[45] In Poland, an international agreement becomes a part of national law after being ratified and published in the 'Journal of Laws'. This means that from the national perspective, EU law also has priority over WTO law.[46] Since international agreements have primacy over secondary EU law, the internal member states' laws must be introduced in accordance with the WTO provisions. The problem arises because in the EU legal order, the Marrakesh Agreement is an international agreement and constitutes a part of EU law. The GATT is under the sole competence of the EU, becoming the element of its law and takes priority over the secondary law.[47]

43 They concern, for example, the TRIPS Agreement. In the case of Daiichi Sankyo, the CJEU argued that Art. 207 TFEU by commercial aspects of intellectual property means standards that have a specific relationship with international trade, which means that the exclusive external competence for the common commercial policy covers the whole of the TRIPS Agreement. Judgment of the Court (Grand Chamber), 18 VII 2013, Case C-414/11: *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon* (ECLI:EU:C:2013:520). Other doubts arise from Art. 352 TFEU, the so-called implied competence clause.

44 C. Mik, *Fenomenologia regionalnej integracji państw. Studium prawa międzynarodowego* ['Phenomenology of regional integration of states. Study of international law'], t. 2, C. H. Beck, Warszawa 2019, p. 3.

45 Idem, *Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej* ['Interpretation consistent with the law of the European Union'], [in:] *Polska kultura prawna a proces integracji europejskiej* ['Polish legal culture and the process of European integration'], red. S. Wronkowska, Zakamycze, Kraków 2005, p. 115 et seq.

46 M. Petritz, *National report Austria*, [in:] *WTO and direct taxation*, ed. M. Lang, J. Herdin, I. Hofbauer, Kluwer Law International, Wien 2005, p. 137.

47 Ibidem, p. 138.

The issue of the hierarchy of sources of EU law is not so obvious when viewing the status of international law in the EU[48] legal order.[49] According to the Court of Justice of the European Union (CJEU), international agreements concluded by the EU become an integral part of the EU legal order. As a result, these agreements are directly applicable and the EU applies a monist approach. The problem appears when there is a collision of norms in the relationships between international agreements *per se*, for example, the TFEU and the GATT. Then the question should be resolved about whether such an issue should be considered from the point of view of the hierarchy of EU law sources, i.e. primary law (TFEU) versus act of *sui generis* (the GATT) or should be based on an act of international public law, i.e. the Vienna Convention on Law of the Treaties (VCLT). In the latter case, there is no hierarchy of acts and norms; therefore, it is very difficult to find a satisfactory solution.

The MFN clause in the GATT

Within the framework of the WTO, the non-discrimination clause is a core of the trade liberalisation in the world. This is twofold and consists of the NT principle and the MFN clause. The NT principle means that discriminatory measures between a resident and non-resident are prohibited, whereas the MFN clause applies to a situation between two non-residents, which means that it only concerns external relations. The essence of the MFN clause is equal treatment of trading partners, meaning that it is impossible to grant specific advantages in trade to only one of them. Thus, the MFN clause is not a customary but a contractual tax law. The MFN clause is stated in Art. 4a of the draft articles on MFN clauses of the International Law Commission as „treatment accorded by a granting State to a beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by a granting State to a third State or to persons or things in the same relationship with that third State".[50]

48 C. Mik, *Fenomenologia…*, p. 68–69.

49 Judgment of the Court of 30 IV 1974, Case 181-73: *R. & V. Haegeman v Belgian State* (ECLI:EU:C:1974:41).

50 *Draft Articles on most-favoured-nation clauses with commentaries. 1978*, United Nations, 2005: <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf> [accessed: 13 I 2021].

In the general sense, the concept of the MFN clause in the GATT means that if one member state grants a benefit to a third member state, then such privilege should be automatically extended to the remaining members of the WTO.

According to Art. I (1) of the GATT:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraph 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any country shall be accorded immediately and unconditionally to the like product originating or destined for the territories of all other contracting parties.

This suggests a very broad meaning of the MFN clause. Reference to Art. III (2)[51] and (4)[52] of the GATT means that the MFN clause applies to all matters to which the NT principle applies.

Due to the criterion of transferability, services are divided into direct and indirect ones. While there is no doubt that the GATT concerns indirect taxes, it can be argued whether the scope of the agreement includes

51 According to Art. III (2) of the GATT, the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

52 According to Art. III (4) of the GATT, the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges, which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

direct taxes. Since it is not possible that some of the provisions of the GATT apply to the first type of benefits, and the rest of the latter, it is worth considering whether the MFN clause, apart from indirect taxes, also applies to income taxes. This is debatable, as when analysing the GATT 47 one has the impression that the negotiators did not think about applying the provisions of the Agreement to this type of tax. On the one hand, it can be assumed that this happened because the topic of DTC was not given much attention at that time. On the other hand, it is difficult not to wonder if the negotiators – experts in the field of economy and tax law – were not aware of the consequences of the unclear scope of Art. I (1) of the GATT. This is so complicated that, unlike the GATS which refers to services and service suppliers, the GATT only uses the term *product* and does not apply to *producers*. Thus, based on the historical interpretation, it can be argued that Art. 1 (1) of the GATT does not apply to direct taxes. Moreover, in 1930, the Financial Committee of the League of Nations indicated that future trade agreements should clarify that the MFN clause in trade agreements did not apply to DTCs.[53] The question arises about what the concept of clarification means and how to assess its legality. Considering the fact that this wording is very general and inaccurate, it is difficult to accept it as a necessary condition to assess whether Art. I (1) of the GATT is applicable to DTCs.

It seems justified to examine whether income taxes can be shifting. This issue is important because the assumption of the GATT is the liberalisation of trade, and indirect taxes may distort its free flow. Therefore, the question arises whether direct taxes can also play this role. Until recently, there was an argument that only indirect taxes were shifting. Currently, the doctrine of tax law does not question the shifting of burdens resulting from direct taxation.[54] An entrepreneur who has a dominant market share may cause the situation in which it will pass on the tax to the consumer in the form of an increase in the price of imported goods.[55] Therefore direct

53 T. K. Stricker, *National report Germany*, [in:] *WTO and direct taxation...*, p. 323.

54 A. Gomułowicz, *Zasada sprawiedliwości podatkowej* ['Principle of tax justice'], Dom Wydawniczy „ABC", Warszawa 2001, p. 21; idem, *Przerzucalność podatków obrotowych w PRL*, ['Shifting of turnover taxes in the Polish People's Republic'], Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu, Poznań 1988, p. 1–177.

55 R. A. Musgrave, P. B. Musgrave, *Public finance in theory and practice*, McGraw-Hill International Editions, Singapore 1989, p. 236–238.

and indirect taxes may be treated as interchangeable.[56] The logic of this argument leads to the conclusion that the MFN clause in the GATT may be about direct taxation.

If on the basis of the literal interpretation it is assumed that income taxes fall within the scope of the NT principle, then pursuant to Art. I (1) of the GATT they are also covered by the MFN clause. However, such an argument is too superficial and needs to be analysed in more detail. Art. III (2) and (4) of the GATT only covers internal charges and measures and the respective laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use and does not indicate that direct taxes fall into its scope. Moreover, neither the contents of Art. I (1) nor of Art. III (1), (2), (4) refer directly to the international agreements. So far, the Panel has not dealt with the issue whether the GATT's MFN clause is applicable to DTCs.[57] Obviously, the lack of legal practice does not make such a reconciliation an easy one. On the other hand, it cannot induce the provision of a negative answer. Additionally, the temporal scope of this article concerns the treatment of goods that are imported and are already located in the territory of another country, and not, as indicated in Art. I (1) of the GATT that they may have not reached the territory of the destination country yet because they are „in the process of importation or exportation". When cross-referencing Art. III (2) of the GATT it should be indicated that this article has been traditionally interpreted as covering indirect taxes and other internal charges applied to imported and domestic products. Therefore, the reference to direct taxes is not so obvious, because each of these taxes is charged with reference to a different subject of taxation. Indirect taxes are charged on the goods, and direct taxes on income. The first sentence of Art. III (2) of the GATT uses the terms *directly* or *indirectly* and does not specify how these terms should be understood. It seems that the point here is to emphasise the discriminatory treatment of imported goods and not to state precisely which taxes are involved. Therefore, it is difficult to argue that pursuant to Art. III (2) of sentence 1 of the GATT Art. I (1) of the GATT may apply to direct taxes. If in reality, there is no violation of Art. III (2) sentence 1,

56 M. Petritz, *National report Austria...*, p. 144.

57 G. Cappadona, *National report Italy*, [in:] *WTO and direct taxation...*, p. 442.

it should be analysed whether the internal measures applied by the state do not violate Art. III (2) sentence 2 of the GATT.[58] As tax issues require particularly precise text analysis, Art. III (2) sentence 2 of the GATT does not indicate that it should be applied to direct taxes.

Art. III (4) of the GATT is the most likely legal basis that the MFN clause relates to direct taxes.[59] Firstly, the content of Art. III (4) of the GATT is much broader than Art. III (2) of the GATT, which may constitute an argument that the GATT negotiators did not intend to exclude direct taxation from the scope of the NT principle. Secondly, in the case of FSC, the Panel stated that the US Foreign Sales Corporation Regime (FSC case) whose conditioning access to income tax advantages should be covered by the language of Art. III (4) of the GATT.[60] This argument, although clear, is somewhat inconsistent. How is, therefore, one to understand that Art. I (1) in connection with Art. III (4) of the GATT relates to direct taxes, while Art. III (2) of the GATT does not have such a characteristic? In addition, in the context of the FSC case, one might wonder if it is possible for national laws that discriminate against imported goods to apply to DTCs, in other words, whether such provisions may arise on the basis of agreements on the avoidance of double taxation and therefore whether the above considerations apply in practice.

Regardless of the above considerations, it can be assumed that, to a limited extent, the MFN clause in the GATT concerns direct taxes. Four prerequisites must be met to determine that a violation of the MFN clause in tax matters has taken place. Firstly, internal measures must be within the scope of Art. I (1) of the GATT. Secondly, this includes granting any advantage, favour, privilege or immunity to customs duties, charges of any kind in import or export, charges on the transfer of payments, the administrative procedure of levying such charges, and formalities connected with the procedure

58 AB Report, Canada – Certain Measures Concerning Periodicals, 3 VI 1997 (WT/DS31/AB/R), para. 22–23. Appellate Body (AB) is the body for appealing Panel decisions within the system of Dispute Settlement Body of WTO.

59 M. Schyle, *Most favoured nation treatment in tax matters in the GATT*, [in:] *The relevance of WTO law for tax matters*, ed. J. Herdin-Winter, I. Hofbauer, Linde, Wien 2006, p. 100.

60 Panel Report United States – Treatment for Foreign Sales Corporation – Recourse to Art. 21.5 of the DSU by the European Communities, 20 VIII 2001 (WT/DS108/RW), para. 8.142.

of importation or exportation. Thirdly, privileged goods and non-privileged goods are alike. Fourthly, privileged treatment has not been extended immediately and unconditionally.

There are some exceptions from the MFN clause in the GATT. According to Art. I (2) to (4) these include regional arrangements, developing countries and grandfather clause preferences of historical origin. According to Art. IX of the Marrakesh Agreement, there is a possibility to exclude, by means of a waiver, a certain issue from being covered by the MFN clause and finally, Art. XX of the GATT deals with general exceptions to all GATT obligations. This covers a situation when, for example, there is a necessity to protect health, public morals, human, animal or plant life, national security, or the balance of payments.

The MFN clause in the EU legal order

At the EU level, contrary to the NT principle, the TFEU does not contain the MFN clause *per se.* This leads to two controversial concepts about the functioning of this institution in tax matters in the EU legal order. The first states that the MFN clause does not exist. This argumentation is supported by the statement that since the NT principle was expressed in Art. 49 and 50 TFEU (formerly 43 and 50 of the TEC), and the MFN clause was not expressed, it was an intentional act of the legislator. The reasoning about the lack of acceptance of the MFN clause in tax matters also results from the principle of respecting the sovereignty of the member states. Direct taxes have not been harmonised in the EU. Hence, the member states themselves regulate the criteria of taxation of income, and their character may differ. However, this does not immediately mean discriminatory treatment. The author thinks that the most important argument against the recognition that the MFN clause in tax matters appears in EU law is the fear of granting illegal contractual benefits to third countries. Granting privileges to states that did not take part in negotiating an agreement based on the principle of reciprocity is contrary to the idea of sovereign power in tax matters.[61]

61 M. Wróblewska, *Klauzula największego uprzywilejowania w dwustronnych umowach o unikaniu podwójnego opodatkowania na podstawie prawa UE* ['The most favoured

The second concept presents an entirely different way of interpretating the provisions of the TFEU. This includes the non-discrimination principle, which applies to four freedoms. Since it relates to the NT principle, it should also be the legal basis for the MFN clause. This position is supported by an argument that Art. 18 (ex Art. 12 TEC) and 45 (ex Art. 39 TEC) and the non-discrimination principle are used in this context. Art. 18 (ex Art. 12 TEC) and 45 (ex Art. 39 TEC), which prohibit discrimination on the grounds of nationality and express the principle of equal treatment, support this concept. Since Art. 18 (ex Art. 12 TEC) covers not only overt but also covert forms of discrimination (by the application of other criteria of differentiation) it results in the fact that violating the TFEU has the same effect. Following Art. 54 TFEU (ex Art. 48 TEC), companies formed by a law of a member state and having their registered office, central administration, or principal place of business within the EU are to be treated in the same way as natural persons who are nationals of member states, which leads to the conclusion that these companies are qualified as nationals in the light of Art. 18 TFEU (ex Art. 12 TEC). Moreover, this article states that „without any prejudice to any special provisions", any discrimination on the basis of nationality is forbidden which means that this ban applies to all situations regulated by EU law unless EU law settles this in a different manner. This, in turn, means that any rule incompatible with the fundamental freedoms is also incompatible with Art. 18 TFEU (ex Art. 12 TEC).[62]

Giving an unequivocal answer that would end the ongoing disputes over whether the EU law expresses a clause in the MFN is, in the author's opinion, currently impossible. This is the problem of the practical aspect and it has not been settled to date. The point of reference comes down to the question of the sources of law. The analysis of only the provisions of the TFEU tends to suggest that with such a limited legal regulation, the sceptical approach of the European Commission and the lack of a clear position of the CJEU in favour of the existence of the MFN clause, it is

nation clause in the double tax agreements on the basis of EU law'], „Gdańskie Studia Prawnicze" 2010, t. 24, p. 308.

62 G. W. Kofler, *Most-favoured-nation treatment in direct taxation: does EC law provide for community MFN in bilateral double taxation treaties?*, „Houston Business and Tax Law Journal" 2005, vol. 5, p. 62.

difficult to prove that the institution finds its foundation in EU primary law. On the other hand, it should not be forgotten that the sources of EU law also include international agreements, which means that the MFN clause in tax matters should be examined on the basis of the GATT and DTCs.

The MFN clause in double taxation avoidance conventions

As both the GATT and DTC contain non-discrimination provisions, it is important to examine their scope. While the MFN clause was clearly expressed in the GATT, this concept is not explicit on the basis of DTCs. Firstly, the provisions of DTCs are based on the OECD MTC which does not regulate this issue *per se*. Art. 24 of the OECD MTC is entitled *Non-discrimination* and consists of six paragraphs. Its content does not distinguish the NT principle and the MFN clause as the GATT does. Thus, Art. 24 of the OECD MTC does not refer directly to the analysed institution.[63]

63 According to Art. 24 of the OECD MTC:

„1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

2. Stateless persons who are residents of a Contracting State shall not be subjected in either Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the State concerned in the same circumstances, in particular with respect to residence, are or may be subjected.

3. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

4. Except where the provisions of paragraph 1 of Article 9, paragraph 6 of Article 11, or paragraph 4 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident

Secondly, the Commentary to the OECD MTC, which serves as an auxiliary tool for the interpretation of the model and DTCs concluded on its basis, is also silent about the MFN clause. The result is that the understanding of the MFN clause in tax treaties is not based on a uniform pattern, because there is simply no such pattern.

Undoubtedly, the material scope of Art. 24 of the OECD MTC concerns taxes on income and capital, i.e. direct taxes. Based on Art. 24 (6) of the OECD MTC, this scope extends to taxes of every kind, which indicates that the non-discrimination principle may also include indirect taxes. Art. 24 of the OECD MTC covers only overt discrimination, while the MFN clause in the GATT has a broader character as it concerns not only overt but also covert discrimination.[64] On the other hand, Art. 24 (6) of the OECD MTC applies to all taxes of every kind and description, that means that the scope of application of DTC may overlap the provisions of Art. 1 (1) and Art. III (1), (2) and (4) of the GATT.

Although Art. 24 of the OECD MTC does not explicitly mention the MFN clause – DTCs refer to this institution. Two opposing groups can be distinguished among the provisions of DTCs: the first one, which prohibits granting the MFN clause, where states reserve the right to grant benefit of any tax treatment to third states partially or wholly (the DTCs are quite often negotiated bilaterally after a long period of time and mutual concessions of parties in the opposite to the GATT are concluded in a multilateral way) and the second, in which states agree to extend tax benefits to third countries on the basis of customs unions, free trade areas and any regional

of the first-mentioned State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.

5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

6. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description".

64 Ch. Nauer, *National treatment in the GATT and the GATS compared to non-discrimination in DTC – similarities and differences*, [in:] *The relevance of WTO...*, p. 243.

agreements.[65] This proves that despite the lack of an appropriate regulation in Art. 24 of the OECD MTC, in practice, the MFN clause is not void, and there is a problem with its interpretation. In addition to the purely definition-related issue, the majority of doubts are raised by the problem of the hierarchy of sources of law, which comes down to seeking an answer to the question whether the exclusion of the MFN clause in DTCs means that a third country cannot invoke it? Or, to the contrary, an EU member state, as a party to the WTO, may, pursuant to Art. I (1) of the GATT claim advantages previously granted to other countries? This problem has already been signalled in point 2 of this article in the context of the relationship between the TFEU and the GATT.

If it is assumed that the EU has exclusive competence in the sphere of the trade of goods (the GATT) and member states introduce DTCs in a particular way, this provides that, according to hierarchy of law, the GATT regulations prevail over DTCs. However, the GATT and DTCs are examples of treaties and should be interpreted in the light of the VCLT.

Conclusions

The concept of the MFN clause was expressed in Art. I (1) of the GATT. As it is an institution of international law that is not reserved for a specific group of trade agreements, pursuant to Art. 24 of the OECD MTC, EU member states can also incorporate it into DTCs they conclude. Therefore, the question arises whether this institution has the same character or whether it has any differences. Firstly, it should be pointed out that the GATT is a multilateral agreement with the aim of removing trade barriers. Thus, the idea of the MFN clause expresses the will to non-discriminatory treatment of partners who trade in goods within the WTO. A completely different philosophy is expressed by DTCs. States-parties to such agreements strive to eliminate double taxation, which has a negative impact on the situation of entrepreneurs and states, as it is associated with an increase in the amount of taxes and impedes the free movement of capital. Therefore, although it seems that on the basis of each of the agreements the MFN clause is the same, while these concepts have similarities,

65 S. Huber, *The most favoured nation principle in WTO and DTC law – similarities and differences*, [in:] *The relevance of WTO…*, p. 271.

there are also differences due to the different purposes of the GATT and DTCs. The similarities include the scope and exceptions to the MFN clause, but the objectives are different.

From the point of view of the scope of the MFN clause in the GATT, it can be applied to indirect taxes. From the analysis of Art. III (4) in connection with Art. I (1) it transpires that, to a limited extent, this institution is applicable to direct taxes. This indicates that the comparison of this concept in the GATT with the MFN clause in the DTCs is correct, since double taxation treaties relate primarily to income taxes. It is also worth emphasising that from the analysis of Art. 24 of the OECD MTC there are no obstacles for DTCs to cover indirect taxes, which are the starting point for the analysis of the provisions of the GATT.

Exceptions should also be mentioned as much as the similarity. In the GATT, they are subjective and objective in their character and include regional arrangements, developing countries and grandfather clause preferences of historical origin. It may be stated that these conditions are analogous to those that appear on the basis of DTCs, i.e. regional arrangements, developing countries and grandfather clause preferences of historical origin.

The objectives of each of the contracts should be pointed out as differences. Since the GATT deals with the trade in goods, it is natural that its provisions, including Art. I (1), focus on this issue. In turn, DTCs emphasise the personal aspect and focus on the situation of the taxpayer, who may be a natural or legal person liable for paying tax.

From the point of view of the MFN clause in the GATT and the DTCs, the most problematic issue is that concerning their relationship. Since the VCLT does not give priority to any of the international agreements, it is extremely difficult to judge how to resolve a possible conflict of norms. It seems that the easiest way would be to prevent such a situation, and in case of doubt, use a friendly interpretation. Solving this complexity is not made easier by the fact that the MFN clause has not been clearly defined in EU law as regards tax matters. Thus, in the current legal system, EU countries – parties to the GATT – can hardly count on the CJEU to comply with their request and recognise the possibility of invoking contractual benefits resulting from DTCs. In the author's opinion, the Court will interpret the regulations of DTCs' MFN clause in the context of Art. 1 (1) of the GATT only if the provisions are coherent, i.e. when it needs to further strengthen

its point of view and support it with the regulations of international law. The author thinks it is even understandable that, in such a delicate matter as tax law, adopting a concept that would allow interference with the intricately structured EU DTC system could lead to its disintegration. The author believes that if the EU had a multilateral DTC pattern, it would be no problem for the CJEU to interpret the MFN clause in the context of Art. 1 (1) of the GATT, because it would then be easy to have uniform interpretation of all double taxation treaties.

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